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1945.

O. Electricity Supply
File No. (L.U. War Costs)
45

Legal Department-

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Subject:— Opinions under the Bombay Electricity Supply (Licensed Undertakings, War Costs) Order, 1944

(P. 6/E)

File No. O. Electricity Supply

Gen. 194 e. (L.U. War Costs)/45-

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C O N T E N T S.

Legal Department File No.O.El.Supply (L.W.War Comm/1945).

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		Opinions under the Bombay Electricity Supply (Licensees undertakings' War Costs). Order, 1944.	
1	4832 28-6-45.	Clause 5-2nd proviso — legality of the Bijapur Electric Supply Co. levying 33⅓% war comm surcharge 3 under the —	1-4.
2	10191 22-11-45. 432 13-2-46.	Question whether claim for refund of surcharge can be made by the Surat Municipality under G.O. No.6041/36, dated 11-3-1943.	5-10.
3	7669 17-10-45.	D of I Rules 81(2)(4) rings of the G.of I., Deptt. of Labour Order No. D.W. 1 dt.13-4-45. —	11-12.

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Office of the R.L.A.

The Bijapur Municipality has questioned the legality of the Bijapur Electric Company levying 33 1/3 % war costs surcharge on its charges for supply of energy inspite of the fact that the rate per unit of energy supplied has been increased from 6as. to 8 as. with effect from 1-9-1942. The President of the Bijapur Municipality contends that in view of the increase in the rate with effect from 1-9-1942 no war costs surcharge can be legally levied under the second proviso to clause (5) of the Bombay Electricity Supply (Licensed Undertakings' War Costs) Order, 1944. The question raised for the consideration of the R.L.A. is whether the contention of the President of the Bijapur Municipality is valid.

2. Clause 5 of the Bombay Electricity Supply (Licensed Undertakings' War Costs) Order, 1944, provides: "Upon the rate of a war costs surcharge being fixed by the Provincial Government from time to time in accordance with this Order, it shall not be lawful for the licensee or sanction holder concerned to supply energy at other than charges surcharged at the rate ofer the time being so fixed." The second proviso to this clause provides that no war costs surcharges shall be effective upon the charges for the supply of energy under any contract entered into after the 1st May 1942 unless such contract provides for the same charges for energy as have been contained in similar previous contracts for similar supply by the license or sanction holder concerned etc.

3. The agreement between the Bijapur Municipality and the Bijapur Electric Supply Company is in the Form Annexure B to the license issued in 1926 which is at page 9 of the P.W.D. File No.2691/36, M Branch. It is not known when the agreement was executed. But it appears from page 27 of the aforesaid P.W.D. File that it was executed sometimes in 1936. Clause 4 of the agreement requires the consumer to pay to the licensee for the energy so supplied and registered at the rates from time to time in force and paid by similar

consumers. Clause 8 provides that this agreement shall be in force for a period of not less than two years in the first instance from the date of commencement of the supply specified in clause 1 and thereafter shall continue from year to year until the agreement is determined as hereinafter provided. Clause 9 lays down: "The consumer shall not be at liberty save with the consent of the licensee to determine this agreement before the expiration of two years from the date of commencement of the supply of energy hereunder. The consumer may determine this agreement at any time after the said period on giving the licensee not less than one calendar month's previous notice in writing in that behalf and upon the expiration of the period of such notice this agreement shall cease and determine without prejudice to any right which may then have accrued to the licensee hereunder." It is clear from clauses 8 and 9 that since the period of 2 years expired long ago the agreement would run from year to year unless it has been determined by either party as provided. It is true that in 1942 the licensee increased the rate from 6 as. to 8 as. But that was done in virtue of clause 4 of the agreement. It is no where stated by the President of the Bijapur Municipality that the agreement was determined in 1942 as provided in clause 9 of the agreement. The President however appears to contend that since the rate was increased, the agreement would be deemed to have been varied with the result that thereafter a new agreement could be spelt out. This contention of the President does not appears to be valid. Section 62 of the Indian Contract Act provides that if the parties to a contract agree to substitute a new contract for it or to rescind or alter it the original contract need not be performed. Since the original contract itself empower the licensee to levy rates from time to time in force, in exercise of which power the rate was changed from 6 as. to 8 as- there is no question of substitution of any new contract for the original or rescission or alteration thereof and the principle of novation has no application.

Consequently it appears that no new contract has been entered into after 1st May 1942 within the meaning of the second proviso to Clause 5 of the Bombay Electricity Supply (Licensed Undertakings' war Costs) Order, 1944 and the levy of the war costs surcharge is valid.

Sd/- P.N.MOOS.
28/6/45.

Remembrancer of Legal Affairs.

U.R. to P.W.D., No. 4832 , dated the 28th June 1945.

SNT/11.7.

R.I.No.10191
9/22-11-45.

Submitted with reference to P.W.D. office note at pp. 101-103 ante. Briefly stated the facts of the case would be as under :

The Surat Electricity Co., Ltd. has been supplying electric energy to the Surat Municipality for the last so many years under various agreements executed in between them, for municipal as well as public consumption. In return the Electricity Co. used to levy a surcharge for the supply of the required electric energy. Govt. by an order No.6041/36 dated 11-3-43 made the levy of such surcharge valid to the extent of 33 1/3 % i.e. the Co. could legally levy a surcharge of 33 1/3 % under that order. It is stated that at the time the Co. levied a surcharge at 10% from the Surat Municipality However in 1944, the Govt. passed an order called the Bombay Electric Supply (Licensed Undertakings' War costs) Otder, 1944, under which Govt. fixed the rates of such surcharges for different undertakings. This was done by Govt. on account of the general rise of prices for electrical goods due to war. This order departed from that Order of 1943, in this respect that while the licensee under the old Order of 1943 could levy a surcharge to the extent of 33 1/3 % , the 1944 Order made it unlawful for the licensee to supply energy at other than surcharged rate, subject to the saving proviso of clause 5 of the Order. Under the B.E.S.(L.U.W.C) Order, 1944, the rate of war costs surcharge for the Surat Electricity Co., Ltd.was fixed to 11% as can be seen from item 1 in G.O.No.6331/36 dated 9th August 1944 at p.19 ante. This levy took effect from 9-8-44, and the surcharged has been levied by the Co. from the Surat Municipality at the same rate till now. The Surat Municipality had taken objection to thelevy of such surcharges and had been on Commr. W.D.'s recommendations paying the same under pretest. But it is stated that the Muncy. has now made representations to the Govt. to the effect that it should be exempted by Govt.

in all fairness and equity from the payment of war costs surcharge under proviso 2 to clause 5 of the B.E.S.(L.U. W.C.) Order, 1944 and the amount of war costs surcharge paid to the Co. under protest~~thereof~~ so far should be ordered to be refunded. The Muncy.appears to contend that the current agreements for the supply of energy and maintenance have been executed after the 1st day of May 1942 i.e. on the 24-11-43 and are operative from 15-7-42 and that the terms and conditions of the previous and current agreements and the charges for energy fixed thereunder are not the same and that in the new agreements all prevautions have been taken by the Co. and provisions made in contemplation of the circumstances that has arisen due to war. Thus the Muncy. claims the refund of the charges paid by it under the G.Os. Nos.6041/36 dated 11-3-43 and 6331/36 dated 11-8-44. The question ~~here~~ as regards levy of surcharge concerning the orders~~of~~ 1944 is considered.by the P.W.D. and has been declared by that Deptt.to be in order in consultation with the Examiner Outside Audit, and is not referred to for opinion. (Pl.see Cl.5 of B.E.S(L.U.W.E.) Order 1944, at slip ~~4~~ in this file.). In this connection however attention is invited to R.L.A.'s (slip M.File O.El.Supply ---Conts/45) No.4832 dated 28th June 1945, under which a similar question was considered. The question for R.L.A's consideration is whether the Surat Muncy. can legitimately claim the refund of surcharge paid by them at 10% under G.Os. No.6041/36 dated 11-3-43.

Office of the R.L.A.

Seen and returned.

Sd/- R.T.Kaparki.

Remembrancer of Legal Affairs.

U.R. to P.W.D., No. 432 ~~3~~ dated the 18th January 1946.

SNI/1117.

Office of the R.L.A.

Prima facie the Government of India, Department of Labour Order No. D.W. 1 dated 13-4-1945 is intra vires the provisions of clause (e) of rule 81(2) of the Defence of India Rules. In the absence of any statement of the grounds on which the Lonavala Khandala Electric Supply Co. , Ltd., challenges the validity of the Order no useful purpose would be served by embarking one any academic discussion of the vires thereof.

2. The claim for compensation would be barred by section 17(2) of the Defence of India Act.

Remembrancer of Legal Affairs.

U.R. to P.W.D., No. 7669 , dated the 17th October 1945.

SNF/21.7.